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**Approval of Partial State National Pollutant Discharge  
Elimination System and Section 404 ProgramsFROM:  
Robert M. Perry General CounselTO: Bruce R. Barrett  
Acting Assistant Administrator for Water**

Approval of Partial State National  
Pollutant Discharge Elimination  
System and Section 404 ProgramsFROM: Robert M. Perry  
General CounselTO: Bruce R. Barrett  
Acting Assistant Administrator  
for Water

United States Environmental Protection Agency Office of General Counsel

January 15, 1982

## MEMORANDUM

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### Core Terms

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partial, leg, legislative history, navigable waters, interim, interstate, issuance,  
suspend, withdraw

## Text

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### Question 1

Does the Clean Water Act (CWA) authorize the Environmental Protection Agency (EPA) to approve partial State National Pollutant Discharge Elimination System (**NPDES**) programs? If so, are there limits on the scope or nature of partial approvals?



### Answer

The CWA probably authorizes partial approvals where a State has ceded its authority to an interstate agency for certain water bodies. The Act also probably allows approval of a

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## Discussion

Section 402(b) of the CWA authorizes any State that wishes to administer its own permit program to submit to EPA a description of the program "it proposes to establish and administer under State law or under an interstate compact." Under § 402(c)(1), within 90 days of the State's submission, EPA must suspend its issuance of **NPDES** permits "as to those navigable waters subject to such program" unless the Agency determines that the program fails to meet the Federal statutory or regulatory requirements. If EPA must suspend its issuance of permits "as to those navigable waters subject to [a State's] program," it follows that the State must issue *all* permits for discharges into those waters. The legislative history confirms this reading. [1](#)

The Senate Report states that "after a State submits a program that meets the criteria established by the Administrator . . . , the Administrator shall suspend his activity in such State under the Federal permit program." 2A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong. 1st Sess., 1489 (Comm. Print 1973). (Hereinafter Leg. Hist.) Moreover, the House Report stated that under § 402(b) "a state desiring to administer its own permit program for discharges into *the navigable waters within its jurisdiction* may submit its program to the Administrator." (Emphasis added.) 1 Leg. Hist. 813. Representative Terry stated that one of the purposes of the bill was "to assure and encourage *full implementation* of permit issuing authority to States which are qualified and have approved programs." (Emphasis added.) 1 Leg. Hist. 580. Similarly, Representative Harrington stated that "the permit program must be put *solely* in the hands of the States" once they meet the applicable Federal requirements. (Emphasis added.) 1 Leg. Hist. 516. The conference report discusses § 402 as providing for a State "to administer its own permit program *in lieu of the Administrator's program*." (Emphasis added.) 1 Leg. Hist. 322. Representative Roe said that a State would apply "for the program in the State" and upon approval by EPA would take over "the program." 1 Leg. Hist. 428. Thus, the legislative history strongly indicates that Congress' understanding was that States were to take over the entire **NPDES** program. See also 1 Leg. Hist. 466 (Remarks of Rep. Dorn), 577 (Remarks of Rep. Reuss), 579 (Remarks of Rep. Roe), 854 (Remarks of Administrator Ruckelshaus).

This view is reinforced by an examination of § 402(a)(5). Section 402(a)(5) of CWA provides for State issuance of **NPDES** permits during the interim period between passage of the Act and EPA's promulgation of § 304(i)(2) guidelines specifying minimum requirements for State programs (the guidelines were promulgated in December 1972). Section 402(a)(5) requires that EPA authorize any State, which the Agency determines to be capable of administering a permit program that will carry out the objectives of the Act, "to issue permits for discharges into the navigable waters within the jurisdiction of such State." This language indicates that the interim State program was to be a full **NPDES** program covering all State waters. The statement of Representative Wright, a leading sponsor of the Act, supports this reading of § 402(a)(5):



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discharges.

1 Leg. Hist. 261.

The fact that only full State **NPDES** programs could be approved in the interim period further suggests that only full, permanent State programs could be approved. It seems unlikely that Congress would require only full programs for an interim period, but allow partial permanent programs. <sup>2</sup> Again, the legislative history supports this conclusion. Representative Wright stated that the interim permit program was meant to allow the continuation of existing State programs, which "could be *expanded* and improved during this phase." (Emphasis added.) 1 Leg. Hist. 261. Ultimate approval was to be given to "the planned *integrated* State permit program." (Emphasis added.) 1 Leg. Hist. 262.

Finally, it is clear that Congress knew how to expressly provide for partial State program approvals in environmental statutes. Section 110(a)(2) of the Clean Air Act thus provides that "the Administrator shall approve . . . [a State implementation] plan, or *any portion thereof*," if he determines that it meets Federal requirements. And under § 1422(b)(2) of the Safe Drinking Water Act, the Administrator may "approve, disapprove, or approve in part and disapprove in part," a State underground injection control program. One cannot attribute too much weight to Congress' use of different language in a separate statute, but the omission of similar language in the CWA nevertheless is some evidence that it does not authorize **partial program** approvals.

There are two circumstances, however, under which partial approval is probably lawful. In the first, a State has ceded its authority over part of its waters to an interstate agency. <sup>3</sup> In such a case, the Supreme Court concluded, in *dicta*, that a State may have a program that covers only the remaining waters. *EPA v. California, supra*. The second case arises where a State cannot, under Federal law, issue certain permits. <sup>4</sup> Here, again, it appears lawful for EPA to approve the State program if it is otherwise complete.

It is less clear whether a State may voluntarily renounce authority to issue **NPDES** permits for certain navigable waters within its territorial jurisdiction. Except for the interstate compacts referred to in the preceding paragraph, the general structure of the statute's approval and disapproval process, together with the legislative history recited above, pose serious legal risks for approval of any such **partial program**. It is even more doubtful that the Clean Water Act and its legislative history provide a basis for arguing that the Act history provide a basis for arguing that the Act authorizes any other type of **partial program** (e.g., by industrial category).

## Question 2

Does the CWA authorize EPA to approve partial State § 404 programs? If so, are there limits on the scope or nature of partial programs?

## Answer



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approve State § 404 programs that do not cover certain traditional navigable waters and adjacent wetlands.

### Discussion

Section 404 authorizes States to submit to EPA for approval "permit program[s] for the discharge of dredged or fill material into the navigable waters." However, under § 404(g), States are prohibited from assuming administration of the program for discharges into "waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto." In this sense, therefore, all State programs must be partial programs.

The real question is thus whether EPA can approve State § 404 programs that only partially cover the remaining navigable waters in the State or that are otherwise incomplete. The statutory obstacle to partial approval of § 402 programs, as noted above, is the requirement that EPA suspend issuance of permits "as to those navigable waters" regulated by the State. By contrast, § 404(h)(2)(A), (3), and (4) require the Corps of Engineers to suspend issuance of permits "for activities with respect to which a permit may be issued" under the State program. On its face, this distinction between the two sections makes the case for partial § 404 approvals more plausible. However, some risk remains, because Congress probably had another meaning in mind for the § 404 language cited above.

This parallel between § 402 and § 404 means that the obstacles in § 402 to partial approval of State programs apply with some force to § 404. In addition, when Congress intended partial programs for dredged and fill material, it made its intent clear. For example, under § 208(b)(4)(B) and (C), States may establish regulatory programs to develop and apply supplemental best management practices for certain discharges or "placements" of dredged or fill material. The legislative history is clear that such § 208 programs did *not* need to reach all discharges, but could be limited to particular classes of activities. See, e.g., 3 Leg. Hist. 421 (Remarks of Rep. Harsha); 3 Leg. Hist. 530 (Remarks of Sen. Wallop).

Thus, as with § 402, partial approval of State § 404 programs entails some significant legal risk.

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disapprove the program or to decline to suspend permit issuance for the "categories, types, or sizes of point sources" not covered by the State program. *Id.* at 28292. No partial programs were ever approved, however, and in 1979, EPA adopted a flat prohibition on partial approvals. 40 C.F.R. § 123.1 (comment), 44 Fed. Reg. 32918 (June 7, 1981). It does not appear that the legality of partial approvals was ever examined in detail in connection with either rulemaking.

**2**

In § 402(c)(1) Congress authorized EPA to withdraw approval of a State program EPA found not to be administered in accordance with Federal requirements. There is overwhelming evidence that Congress authorized withdrawal only of the entire State program and prohibited withdrawal of parts of a program. For example, Congress rejected an Administration proposal to allow EPA to withdraw approval of only part of a State program. 2 Leg. Hist. 1205; 1 Leg. Hist. 854-5; 2 Leg. Hist. 1189. *See also* 1 Leg. Hist. 262 (Remarks of Rep. Wright). However, this legislative history is not dispositive as to partial *approval* of a program, since Congress could conceivably have meant that even if a **partial program** was approved, EPA could not withdraw only part of that program. In *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200 (1976) (hereafter *EPA v. California*), the Supreme Court found that this legislative history simply indicated that States must "be given maximum responsibility for the permit system and that the EPA's review authority be restricted as much as was consistent with its overall responsibility for assuring attainment of national goals." *Id.* at 224 n. 29.

**3**

Section 402(b) allows programs to be submitted by an "interstate agency."

**4**

In *EPA v. California, supra*, the Court said that "the EPA obviously need not, and may not, approve a state plan which the state has no authority to issue because it conflicts with Federal law." *Id.* The Court was referring specifically to permits for Federal facilities, which it held States had no authority to issue under the pre-1977 CWA. The 1977 amendments to the Act lifted this prohibition. Under a similar rationale, the General Counsel has concluded that State **NPDES** programs may not, absent "clear Congressional consent," be applied to Indian activities on a reservation. Letter from G. William Frick to Louis J. Breimhurst, May 24, 1977, at 1.



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